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Reflections on the Governor's Commission

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Looking back upon the Commission members and staff, they were a remarkable group of knowledgeable and dedicated people. We had no power blocks. Political affiliations did not control. Voting shifted by issue. Sometimes the vote was unanimous, sometimes five to four. But everyone worked together, assisted no doubt by the presence of a retired Chief Justice of the California Supreme Court as our leader. The Commission relationships in a way became symbolic of what we knew had to occur in the State as a whole if constructive movement were to occur.

Initially, however, there were concerns about the tentative makeup of the Commission. Regulators and environmental interests were well represented, but no one had been suggested from the water community. Our State Senator from Riverside, Robert Presley, spoke to the Governor to get me added to the Commission. He felt that it was essential to have someone on the Commission with practical experience in representing water suppliers and users, and in water rights adjudications. Ultimately, the Governor named two practicing lawyers experienced in water matters—Tom Zuckerman from the San Joaquin Valley, and me from Southern California.

This was a strong Commission. Proposals and directions originated within the Commission, not from drafts first developed by the staff. I recall at the first meeting we were presented with certain written materials already prepared by the staff. I did not agree with everything that was put before us, and I am sure that was also true of the others. In any event, that material was quietly set aside, and from that time on the Commission developed its own agenda and policies.

The reaction of the media to the Commission's Final Report was somewhat surprising. The Los Angeles Times labeled the Report as making "sweeping changes." The legal newspaper, the Los Angeles Daily Journal, headlined "major changes." The Sacramento Bee said "tight controls urged." Yet Chief Justice Wright viewed the Commission's proposals as "moderate," and Justice Cobey as "conservative." My own belief, expressed in a speech to the Metropolitan Water District Board in February 1979, was that the Report was moderate, and indeed far more conservative than might have been expected at the outset. In the hearings held around the State during our first six months of work, the

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Commission came to realize that considerably more water management existed, particularly of groundwater in Southern California, than most people had previously understood. The Commission further acknowledged that under the trying conditions of 1976-77, two of the driest years in history, the system had performed much better than might have been anticipated.

It is true that water rights law in California is unlike that of any other western state; that if we were starting over, our system would undoubtedly be substantially different; that water rights law has developed over time, adapting to society's needs largely through court decisions; and that the system does not fit neatly, or at all, into a theoretical matrix of good government structure. Yet, it did not appear that there was a need for, or that improvements would result from, the many proposals for sweeping changes put before us—e.g., adjudicating all water rights in the State; bringing all pre-1914 rights under the State Board; establishing a State permit system for all groundwater pumping; abolishing riparian rights; and using price to force lower water use. The Commission finally recommended that the "established structure of water rights be retained," and that deficiencies be remedied rather than attempting some untried system.[1] It was recognized that water conditions are often locally unique, and that carefully tailored solutions are required.

The Commission understood, however, that just because our water rights system had served us reasonably well over the last century, did not mean that it would be adequate, without changes, for the future. This was especially true with respect to the control of groundwater. It was then believed that the State's groundwater resources were being overdrafted at the rate of about 2 million acre-feet a year. Groundwater control was left largely to the courts, but regulation under a court decree (as in Southern California) depends upon someone bringing an adjudication action. This had not been done, and was not likely to be done, in the San Joaquin Valley where most of the overdrafting was occurring. Not only would the costs of such an adjudication suit have been enormous, but the agency or person bringing such a suit would have had its own pumping rights cut back, as well as the rights of those who were being sued for excessive pumping.

The law with respect to groundwater was perhaps the most difficult and sensitive issue before the Commission. It was of particular interest to me because I had been involved in most of the adjudication and management districts in Southern California. I stayed in close contact with leaders of the water community as the Commission's groundwater proposals began to form. In particular, I talked frequently with Stu Pyle, then the general manager of Kern County Water Agency and one of the most important agricultural water figures, in an effort to gain San Joaquin Valley support. I explained that a "do-nothing" approach, in the face of the large and continuing overdraft, was not acceptable and in the long run would not survive. The emerging policy of the Commission

1. GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, FINAL REPORT 12-13 (1978) [hereinafter FINAL REPORT].

with respect to groundwater was to favor local management, as opposed to tight state control or reliance solely on court adjudications; to require planning to address not only overdraft but also the export of surplus water and the use of groundwater storage capacity; and to provide local management with authority to limit pumping and levy extraction charges for replenishment. If such planning were not properly implemented, the State Board could request the Attorney General to seek judicial relief. This seemed to me, and ultimately to the Commission, to be a practical and workable approach and an acceptable balance between local control, but still with some State oversight if the local agency were not performing.

Though I gave speeches at the Association of California Water Agencies conference, the Southern California Water Conference, the Water Education Foundation, and at the California Water Resources Management conference, and although I appeared before the Metropolitan Water District's Board, and the State Senate and Assembly Water Committees, I was not able to get the support needed to implement the groundwater recommendations. Too many people in the water community complained that without a more certain program to develop additional water supplies, the Commission's groundwater proposals would amount to nothing more than a rationing program.

While the Commission's priority was to shift emphasis from court adjudications to management, the Commission did make a number of recommendations to make the adjudication process more efficient and effective. Most of these recommendations came from my own experiences, when at times the usual court rules had been skillfully used to thwart rather than to obtain a court decision. Cross-complaining against more parties, and seeking delay, are typical techniques used or threatened for such a purpose. Accordingly, the Commission recommended: appointment of an outside judge who would be exempt from a peremptory challenge to prevent late and repetitious efforts to disqualify the judge without cause; limiting the geographical area to prevent expansion beyond practical limits; requiring data from electric utilities to identify pumpers; providing for a lis pendens through publication to bind successors to original parties; eliminating the mandatory dismissal requirement if the case were not tried within five years; allowing Department of Water Resources reports to be admissible as prima facie evidence of overdraft; and allowing preliminary injunctions without bond to limit pumping in an overdrafted basin to maximum extractions in the five years prior to the action.

Regrettably, these recommendations, though perhaps not as controversial as groundwater controls, were also lost. However, they still remain worthy ideas.

Finally, with respect to groundwater law, the Commission found that the law was at a "point of great uncertainty."[2] Only two years before the Commission was appointed, Chief Justice Wright had authored the lengthy groundwater

2. *Id.* at 143.

decision in *City of Los Angeles v. City of San Fernando*.[3] That opinion ruled out mutual prescription among public agencies. In effect, it overturned a main portion of the doctrine that had been used successfully to adjudicate, mostly by stipulation, the groundwater basins in Southern California. Instead, the court reaffirmed traditional principles of appropriative rights and priorities as the basis for determining groundwater rights in an overdrafted basin.

When I came to know Chief Justice Wright well enough, I was able to tell him that I thought the principles in *Los Angeles* were simply not workable. No one could figure out what groundwater rights were likely to be under that decision in a complex adjudication.[4] The Chief Justice recognized that there could be problems in the strict application of that decision, and wisely pointed to the equitable apportionment reference in the case and the now well-known footnote sixty-one.[5] I well remember his wry comment that "the law of the future is often found in the footnotes of the past." Unfortunately, in my belief, the California Supreme Court in the *Mojave*[6] case twenty-five years later did not share that view. But that court has yet to face the problems of trying to apply its simplified priorities in an actual complex adjudication when hundreds of parties have failed to come to an agreement.

In any event, the Commission recognized that the priority rules developed for stream system adjudications did not easily transfer to groundwater basins. While stating that mutual prescription was not being "revitalized," the Commission recommended an improved equivalent, namely that allocations in a groundwater adjudication be based on a "fair and equitable apportionment of rights . . . with considerable discretion to be left in the court."[7] While not the law now, that recommendation may yet prove to be needed in the future.

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3. 537 P.2d 1250 (Cal. 1975).

4. We gave a hypothetical situation to the staff involving both overlying and municipal pumping (i.e., appropriative rights), long-standing and recent pumping, a basin beginning in surplus but going into overdraft for many years, some municipal pumping beginning when there was surplus and some when the basin was in overdraft, municipal pumping increasing at different rates, an economy which had developed on the basis of the overdraft and the involvement of a number of cities, water districts and public utilities, together with hundreds of farmers. This, in fact, is not unlike the actual situation in the *Mojave* case decided mostly by stipulation in 2000. The staff could not agree on what the various groundwater rights of the individual pumpers would be in such a complex, but not atypical, situation.

5. *City of Los Angeles*, 537 P.2d at 1298 n.61.

6. City of Barstow v. Mojave Water Agency, 5 P.3d 853 (Cal. 2000).

7. FINAL REPORT, *supra* note 1, at 169.